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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 321

OGLE PROTECTION SERVICE, INC., AND JAMES L. OGLE, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–21) is reported at 375 F. 2d 497. The decision and order of the National Labor Relations Board (J.A. 504a–559a)[1] are reported at 149 NLRB 545.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1967 (Pet. App. 17). The petition for a writ of certiorari was filed on July 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer reached an agreement with the union on the terms of a collective bargaining contract, and, therefore, violated its bargaining obligation under the National Labor Relations Act by repudiating the agreement and refusing to embody it in a written contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pages 3–5.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Ogle Company is engaged in the business of providing plant protection services, and the Union[2] has been recognized as the bargaining representative of the Company's employees since 1957 (J.A. 511a, 513a). In May 1960, the parties entered into a one-year collective bargaining contract which was thereafter amended and extended to July 15, 1962 (J.A. 513a–514a; 447a–448a).[3] The Union gave due notice

[2] International Union, United Plant Guard Workers of America, and its Local 114.

[3] In November 1960, the Union filed unfair labor practice charges against the Company, which resulted in a settlement stipulation and the entry of a Board order in April 1961. That order required the Company, *inter alia*, to cease and desist from refusing to bargain with the Union over grievances and other contractual matters, and to designate a negotiator who would be available at reasonable times to deal with the Union. (J.A. 513a–514a.)

of its intention to terminate that contract and requested negotiations for a new agreement (J.A. 516a). The initial bargaining session was held on July 9, 1962, at which time the Union acceded to the Company's request for a recess of 30 days in order to study the Union's new proposals. In the meantime, the parties agreed to an indefinite extension of the existing contract, subject to termination by either party on 10-days notice. (J.A. 516a; 449a). The sole question raised by the petition is whether there is substantial evidence in the record to support the Board's finding that, in the subsequent negotiations, the Company actually agreed with the Union as to the terms of a new contract. The pertinent facts are as follows.

On August 14, 1962, the parties met again. The Union was represented by its president and vice-president, Benton Bilbrey and Willie England, and the Company was represented by its president, James Ogle. Ogle agreed to all of the Union's contract proposals except those classified as "economic," *i.e.*, those bearing on the wage scale, holidays, holiday pay, and insurance. The Union's demands included the same wage scale that it had already obtained from the Company's competitors. (J.A. 516a; 8a–9a.) A third meeting was held on September 19, but again no agreement was reached on the economic issues (J.A. 516a; 10a). Two subsequent meeting dates were cancelled by Ogle (J.A. 516a; 10a–11a). On October 9, Bilbrey telephoned Ogle and accused him of stalling; Ogle replied that the Union was trying to put him out of business (J.A. 516a; 11a). Thereafter, the employees

authorized the calling of a strike, and Bilbrey again requested Ogle to resume negotiations. Ogle replied that he was a sick man, but that his attorney, David Colman, who had negotiated and signed a prior bargaining agreement for the Company, would represent the Company in further negotiations. Ogle asserted that Colman had full authority to consummate an agreement. (J.A. 516a–517a; 11a–13a, 15a, 448a.)

On November 2, Bilbrey and three employee-committeemen met with Colman. Bilbrey informed Colman that the parties had already reached agreement on the noneconomic provisions of a new contract but agreed to Colman's request for certain changes in the language. The Union then demanded that the wage rate proposed by it be given effect as of November 1, 1962, and that the new contract have a three-year term. Colman requested that all new economic benefits be effective January 1, 1963, and that the new contract have a December 31, 1963, termination date. Colman further sought the deletion of an economic proposal calling for Company payment of certain license fees. The Union consented, provided that agreement were reached on the remaining proposals. The meeting ended when Colman said he had full authority to bind the Company but wanted to talk the matter over with Ogle first (J.A. 517a; 15a–19a.)

The parties convened again on November 14, with Colman and Ogle representing the Company, and Bilbrey, England, and the employee-committee representing the Union. At this meeting the Company acceded to the Union's economic proposals; the Union, in turn, agreed that the new contract would run only

from November 14, 1962, to December 31, 1963, and that the economic clauses would be effective as of January 1, 1963. Ogle's consent to the Union's wage proposal was given reluctantly. He contended that the Company's customers were mainly hospitals and that, therefore, it would be difficult to raise their rates to reflect the increased labor costs. Nevertheless, Ogle finally agreed to the wage increases, and the Union agreed to review the matter of wages in January if the Company were unsuccessful in its attempts to raise rates. It was also agreed that Colman would draft the completed agreement. (J.A. 517a–519a, 521a–522a; 10a, 20a, 50a, 410a, 437a.)

Between November 14 and December 5, Bilbrey telephoned Colman twice to ask if the contract had been drafted. Each time Colman replied that he had been too busy. Finally, Bilbrey offered to draft the agreement and Colman assented to this. By December 11, Bilbrey had completed the draft except for the insurance clause, and, on that day, Colman dictated the insurance clause to Bilbrey's secretary. On December 12, Bilbrey sent six copies of the complete contract to Colman, who agreed to proofread them and have them signed and returned by December 14. Bilbrey then sent notices to the employees informing them that a contract ratification meeting would be held on December 19. (J.A. 519a; 21a–23a, 45a–47a, 481a.)

When the signed copies were not returned as promised on December 14, Bilbrey called Colman, who said that he would take the agreement home over the weekend and return the signed copies on Monday, December 17 (J.A. 519a; 23a–24a). On December 18,

however, Bilbrey still had not received a signed copy and again called Colman. Colman said, "Well, I proofread them and everything is satisfactory, so I'll send them right over now to Mr. James Ogle's office for him to sign"; "they will be delivered to your office by closing time." (J.A. 519a; 24a.) That evening Bilbrey telephoned Colman and informed him that the contract had not been returned. Colman expressed surprise and asked Bilbrey to call back in an hour. When Bilbrey did so, Colman asserted that Ogle had promised to sign the copies and return them to the union hall by 9 a.m. in the morning, before the scheduled employee ratification meeting. (J.A. 519a–520a; 25a.)

Although signed copies were not delivered the next morning, Bilbrey held the meeting and read the agreement to the employees present who unanimously voted to ratify it (J.A. 520a; 25a). Bilbrey then telephoned Ogle who asserted that his son, by mistake, had taken the signed copies of the agreement to his office instead of the union hall. When Bilbrey responded angrily, Ogle said, "I'll tell you right now, I'm not going to go through with this agreement." (J.A. 520a; 25a–26a.) Bilbrey stated that as far as the Union was concerned the parties had an agreement and that he was sending Union Vice-President England over to pick up the promised signed copies. When England arrived at the Company, Assistant Manager Morrison handed him two unsigned copies of the agreement. England then spoke to Ogle who said he was glad that his son had mistakenly brought the agreement to his office because now he was not going to sign it. Ogle

refused to give England the other four copies of the agreement. (J.A. 520a; 26a, 54a.)

On January 3, 1963, Ogle asked Bilbrey for a meeting to discuss the contract. Bilbrey consented and requested Ogle to bring a signed copy of the contract. When the parties met on January 7, Ogle said he was having difficulty obtaining higher rates from his customers. The Union took the position that the parties had an agreement. A final meeting on January 30 produced no change in the parties' position. (J.A. 521a; 29a–31a, 34a–36a.)

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

Based upon the foregoing facts, the Board found that the Company had, in fact, reached a complete agreement with the Union on November 14, 1962, and that it therefore had violated Section 8(a) (5) and (1) of the Act by repudiating the agreement and refusing to embody it in a signed document (J.A. 521a–522a, 554a). The Board's order, *inter alia,* requires the Company to cease and desist from the unfair labor practices found, and, at the Union's option, either to execute the agreement reached on November 14, 1962, and give it effect until the next renewal date as provided in the agreement, or to bargain with the Union immediately for a new agreement. In the event that the Union elects the former alternative, the Board's order further requires the Company to make the employees whole for any losses suffered by reason of the Company's refusal to execute the agreement on November 14, 1962. (J.A. 506a–509a, 555a–559a.)

The court of appeals sustained the Board's findings and enforced its order in the foregoing respects (Pet. 17-21).[4]

ARGUMENT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(d) defines "to bargain collectively" as including "the execution of a written contract incorporating any agreement reached if requested by either party." Accordingly, it is settled law that an employer violates the Act if, after "reach[ing] an agreement with the Union concerning wages, hours and working conditions of the employees, [he] nevertheless refus[es] to sign any contract embodying the terms of the agreement." *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 523-526.[5] In this case the Company simply challenges the factual

[4] The court below also sustained the Board's findings that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and negotiate with the Union concerning grievances, on and after January 18, 1963 (Pet. 21). In its petition, the Company does not challenge this aspect of the court's decision.

The court set aside the Board's findings that the Company also violated Section 8(a) (3) and (1) of the Act by discharging two employees for engaging in union activities; accordingly, the court refused to enforce the portions of the Board's order based on such findings (Pet. 21).

[5] Accord; *National Labor Relations Board* v. *Warrensburg Board & Paper Co.*, 340 F. 2d 920, 921 (C.A. 2); *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 362 F. 2d 217, 219 (C.A. 4); *National Labor Relations Board* v. *Wate, Inc.*, 310 F. 2d 700 (C.A. 6); *Lozano Enterprises* v. *National Labor Relations Board*, 327 F. 2d 814 (C.A. 9).

finding of the Board, sustained by the court of appeals, that it had actually come to an agreement with the Union (Pet. 7–12, 14–16). It challenges no more than the substantiality of the evidence, a matter which admittedly turns on the Board's assessment of the credibility of the witnesses (Pet. 7–10; see J.A. 517a–518a, 519a, n. 6), and does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502–503. In any event, the facts summarized in the Statement amply support the Board's finding that by November 14 the Company had reached complete agreement with the Union on the terms of a new contract.[6]

[6] Contrary to the Company's contention (Pet. 15), the element of assent necessary to establish a collective bargaining agreement, like any other contract, may be proved without showing an "admission." See 1 Corbin, *Contracts* § 18 (1963). Here the Company's assent was proved by Ogle's words at the November 14 meeting (*supra*, p. 5), by Colman's subsequent statement to Bilbrey that the draft of the agreement prepared by Bilbrey was "satisfactory" and would be signed (*supra*, pp. 5–6), and by the other probative evidence summarized in the Statement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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